

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Core Communications, Inc.)	WC Docket No. 03-171
)	
Petition for Forbearance Under)	
47 U.S.C. § 160(c) from Application of)	
the ISP Remand Order)	

**OPPOSITION TO CORE COMMUNICATIONS, INC.'S
PETITION FOR FORBEARANCE**

BELLSOUTH CORPORATION

Stephen L. Earnest
Richard M. Sbaratta

Its Attorneys

BellSouth Corporation
Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375
(404) 335-0711

Dated: August 29, 2003

TABLE OF CONTENTS

I.	Introduction and Summary	1
II.	The Petition is Fundamentally Flawed, Offering No Substantiated Evidence to Meet the Criteria of Forbearance	4
A.	The D.C. Circuit's Remand Without Vacatur of the Commission's Order Is No Basis For Forbearance.....	4
B.	Core's Allegations of Discrimination are Unfounded and Do Not Support the Determinations Necessary for Forbearance	6
C.	Core's Assumptions About the Impact of the <i>ISP Remand Order</i> on the Telecommunications Industry are Off Base	8
III.	Core Does Not – and Cannot – Meet the Statutory Criteria Set Forth in 47 U.S.C. § 160(a)	9
A.	The Petition Does Not Support the Criterion Set Forth in § 160(a)(1).....	10
B.	The Petition Does Not Support the Criterion Set Forth in § 160(a)(2).....	11
C.	The Petition Does Not Support the Criterion Set Forth in § 160(a)(3).....	12
IV.	Conclusion	13

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Core Communications, Inc.)	WC Docket No. 03-171
)	
Petition for Forbearance Under)	
47 U.S.C. § 160(c) from Application of)	
the ISP Remand Order)	

**OPPOSITION TO CORE COMMUNICATIONS, INC.'S
PETITION FOR FORBEARANCE**

BellSouth Corporation, on behalf of itself and all wholly owned affiliates ("BellSouth"), by its attorneys, files this Opposition to Core Communications, Inc.'s ("Core") Petition for Forbearance¹ regarding the Commission's *ISP Remand Order*.² The Petition does not meet the requirements of Section 10 of the Telecommunications Act of 1996 ("1996 Act")³ and is based on policy positions considered and rejected by the Commission in the *ISP Remand Order*. For each of these reasons, the Commission must reject Core's request and deny its Petition.

I. Introduction and Summary

Core's Petition asks the Commission to forbear from "applying the provisions of the *ISP Remand Order* to the exchange of ISP-bound traffic between telecommunications carriers."⁴

¹ Core Communications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c) from application of the *ISP Remand Order*, WC Docket No. 03-171 (filed July 17, 2003) ("Petition").

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, *Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

³ 47 U.S.C. § 160.

⁴ Petition at 1. As a procedural matter, the *ISP Remand Order* established compensation arrangements that carriers must follow in negotiating carrier-to-carrier interconnection agreements. The carriers followed these guidelines in such negotiations and the agreements were approved by and are enforced by state public service commissions. Accordingly, there are no

The Commission adopted this *Order* to correct severe market distortions that were occurring in the exchange of ISP-bound traffic between competitive local exchange carriers ("CLECs") and incumbent local exchange carriers ("ILECs"). As the Commission discussed in the *ISP Remand Order*:

Traditionally, telephone carriers would interconnect with each other to deliver calls to each other's customers. It was generally assumed that traffic back and forth on these interconnected networks would be relatively balanced. Consequently, to compensate interconnecting carriers, mechanisms like reciprocal compensation were employed, whereby the carrier whose customer initiated the call would pay the other carrier the costs of using its network.⁵

The Commission recognized, however, that "Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results."⁶

Core is a competitive local exchange carrier ("CLEC") that developed a business plan built upon such regulatory arbitrage. It identified the windfall that could be achieved by merely signing up ISPs as its customers and creating an enormous imbalance of incoming traffic. This influx of one-way ISP-bound traffic resulted in large reciprocal compensation payments being made from ILECs to CLECs. Indeed, Core's business plan very clearly fits the profile acknowledged by the Commission as creating "two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, . . . ; (2) the large one-way flows of cash made it possible for LECs

rules that the Commission is enforcing from which it can forbear. Thus, the Commission could not grant Core's Petition even if it found the Petition to merit such relief – which it does not.

⁵ *ISP Remand Order*, 16 FCC Rcd at 9162, ¶ 20.

⁶ *Id.*, ¶ 21.

serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.”⁷ Based on strong policy objectives to eliminate this type of arbitrage, the Commission addressed and corrected these problems, through a series of orders, by finding that ISP-bound traffic is interstate in nature and not subject to reciprocal compensation arrangements.⁸ The Commission also issued a *Notice of Proposed Rulemaking*⁹ to determine if a bill-and-keep compensation regime should be implemented for intercarrier transfer of traffic.¹⁰

The Core Petition is nothing more than an attempt to have the Commission abandon its policies regarding intercarrier compensation for the exchange of ISP-bound traffic and return to the market distortions created by the regulatory arbitrage that served to undermine the operation of competitive markets. Relying on nothing more than false allegations and a flawed business plan, Core asks that the strong policy reasons and past precedent relied on by the Commission in implementing the *ISP Remand Order* be ignored in favor of a gaming opportunity that provides exceptional windfalls through reciprocal compensation arbitrage. Core’s basis for this request is

⁷ *Id.*

⁸ *See id.* at 9152-53, ¶1. The Commission instituted a transition plan that allowed CLECs who had an interconnection agreement with an ILEC as of the effective date of the order to continue receiving reciprocal compensation for ISP-bound traffic for a period of time at a capped rate and a capped number of MOUs. CLECs that did not have an interconnection agreement with an ILEC as of the effective date of the order must exchange ISP-bound traffic on a bill-and-keep basis. *See id.* at 9186-93, ¶¶ 77-88.

⁹ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001).

¹⁰ *See ISP Remand Order*, 16 FCC Rcd at 9153, ¶ 2 n.6 (“‘Bill and keep’ refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network.”)

that its arbitrage activities have been severely hampered and it wants the rules to go away so it can return to the regime that provided Core twisted economic results. Indeed, Core makes no excuse for its desire to return to a policy that the Commission found to be “distorted” and “created an opportunity for regulatory arbitrage and leading to uneconomical results.” It simply wants to follow through with a business plan of serving only ISP customers and reaping the unfair benefits of one-way traffic.

II. The Petition is Fundamentally Flawed, Offering No Substantiated Evidence to Meet the Criteria of Forbearance

The first part of the Petition discusses issues that Core relies upon for proof that the criteria of the 1996 Act’s forbearance section are met. As discussed in this section, much of the Core’s discussion either misconstrues the facts or is incorrect. None of the reasons set forth by Core support its Petition.

A. The D.C. Circuit’s Remand Without Vacatur of the Commission’s Order Is No Basis For Forbearance

Core asserts that “[t]he *ISP Remand Order* has no basis in law and discriminates against and among CLECs in favor of the BOCs.”¹¹ First, Core offers a sophistic claim that the rules and regulations established by the Commission are legally flawed because of the D.C. Circuit’s finding regarding the Commission’s Section 251(g) authority and the remand of the *ISP Remand Order* based on that finding.¹² Core contends that because the court found that 251(g) was not susceptible to the Commission’s reading, then the rules implemented by the *ISP Remand Order* are invalid and the Commission should forbear from applying them. Thus, Core is asking the

¹¹ Petition at 2-3.

¹² *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

Commission to do what the D.C. Circuit expressly refused to do – vacate the *ISP Remand Order*. Core’s reasoning, however, is wrong.

In reaching its finding that Section 251(g) did not provide a basis for the Commission’s actions, the D.C. Circuit stated “[b]ecause there may well be other legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs, we neither vacate the order nor address petitioners’ attacks on various interim provisions devised by the Commission.”¹³ Accordingly, even though specifically requested by the petitioners in the *WorldCom* case, the D.C. Circuit did not see reason to vacate the Commission’s rules but instead recognized that the Commission probably had authority to implement the rules that it did; that authority did not rest in Section 251(g), however. Had the court determined that the Commission’s actions were “an unlawful exercise of the Commission’s authority under the Act,” as the Petition alleges, the court would have no doubt vacated the *ISP Remand Order*. The D.C. Circuit denied a request for rehearing and the United States Supreme Court denied a writ of certiorari filed by Core.¹⁴ Having lost all legal battles, Core now tries to reanimate its failed arguments by asking the Commission to forbear from applying rules that were implemented pursuant to valid policy considerations, in part because of the D.C. Circuit’s ruling. The mere fact that the court remanded the *ISP Remand Order* without vacating it is not a valid basis for such change. Moreover, Core makes no attempt to tie this position to any of the elements set forth in forbearance section of the 1996 Act. Thus, the D.C. Circuit’s decision is irrelevant to the Commission’s forbearance determination.

¹³ *Id.* at 430.

¹⁴ *Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003).

B. Core's Allegations of Discrimination are Unfounded and Do Not Support the Determinations Necessary for Forbearance

Core spends the significant portion of the Petition arguing that the rules of the *ISP Remand Order* are discriminatory and have had a negative impact on investment in the telecommunications industry. Using misquoted sections of the *ISP Remand Order*, unsubstantiated claims, and strange logic, the Petition is nothing less than a jumble on both of these issues. To begin, Core seems to be arguing that the rules have discriminated against CLECs in favor of BOCs;¹⁵ however, the Petition focuses more on the fact that some CLECs can continue to collect reciprocal compensation under the Commission's transition plan while other CLECs must use a bill-and-keep arrangement. When the Petition does address situations that Core contends are BOC disparities, it does so on vague conclusions that the BOCs are somehow benefiting from the rules at the expense of the CLECs. These claims have no merit.

The *ISP Remand Order* implemented a compensation plan that allows carriers to move from a reciprocal compensation plan to a bill-and-keep plan for ISP-bound traffic. For those CLECs that were trading traffic with an ILEC as of the effective date of the *Order*, the rates apply for both carriers. The Commission specifically addressed the concern of ILECs picking and choosing among the compensation plans depending upon the nature of the traffic exchanged and determined that the "rate caps for ISP-bound traffic that [it] adopt[ed pursuant to the *ISP Remand Order*] apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject

¹⁵ Petition at 2-3 ("The *ISP Remand Order* has no basis in law and discriminates against and among CLECs in favor of the BOCs. . . .").

to section 251(b)(5) at the same rate.”¹⁶ The Commission went on to state “[f]or those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts.”¹⁷ The Commission, thus, concluded, “[t]his “mirroring” rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.”¹⁸ Core’s allegations that the rules set forth in the *Order* discriminate against CLECs in favor of ILECs therefore have no basis in fact.

Core’s allegations that the rules discriminate in favor of CLECs that were exchanging traffic with an ILEC as of the effective date of the *Order* over CLECs that were not exchanging such traffic are irrelevant and have no bearing on the Petition. Even if one accepted Core’s claims, they do nothing to address any of the criteria in 47 U.S.C. § 160 that Core must prove in order to obtain forbearance. The Commission recognized that some CLECs that built their business cases around the one-way receipt of compensation from ILECs for ISP-bound traffic would struggle financially.¹⁹ The Commission, however, wisely concluded that the public policy

¹⁶ *ISP Remand Order*, 16 FCC Rcd at 9193, ¶ 89. It is this part of the *Order* that Core attempts to sweep under the rug. It cites the first part of the paragraph where the Commission discusses the concern but conveniently omitted the rest of the paragraph, quoted above, where the Commission provides a solution to the concern. It is not surprising that Core has chosen to omit and misuse quotes from the *Order* to try to support its Petition, given the weak position that it tries to advocate.

¹⁷ *Id.* at 9194.

¹⁸ *Id.*

¹⁹ *Id.* at 9192, ¶ 87 n. 171 (“We acknowledge, however, that any CLECs that use reciprocal compensation payments to offer below cost service to ISPs may be unable to continue that practice under the compensation regime we adopt here.”).

reasons for eliminating this form of regulatory arbitrage were more important than an artificial CLEC business plan.²⁰

Core strains to invent these allegations of discrimination in an effort to have a basis for meeting the statutory obligations for forbearance. As discussed, its attempt falls miserably short. More importantly, however, even if its allegations had merit – which they do not – they do not support any of the criteria of 47 U.S.C. § 160.

C. Core's Assumptions About the Impact of the *ISP Remand Order* on the Telecommunications Industry are Off Base

The Petition's allegations that the *ISP Remand Order* has hampered investment in the Telecommunications industry are equally without merit. Core's meretricious arguments that the Commission's elimination of an arbitrage scheme had a negative impact on investment in the telecommunications sector hardly deserve a response. While BellSouth does not dispute that some CLECs' business plans may have been impacted by their inability to receive reciprocal compensation for ISP-bound traffic as they did before the *ISP Remand Order*, it was only the business plans of those CLECs that were gaming the system through arbitrage that would have been "rendered meaningless."²¹

Core does not even attempt to dispute the Commission's findings that the arbitrage scheme perpetuated through reciprocal compensation payments prior to the *ISP Remand Order* distorted competitive markets. Instead, Core cobbles together a claim that had it been allowed to continue to distort the market by subsidizing its ISP customers through the recovery of costs from originating carriers then it would have continued to invest in a minimal amount of

²⁰ *Id.*

²¹ Petition at 8.

equipment needed to serve more ISP customers.²² One can hardly attribute the poor economic times suffered by the telecommunications industry to Core's dubious claim that the *ISP Remand Order* curtailed the investment of CLECs whose business case was based on regulatory arbitrage. Core should review past analysts' reports discussing the decreases in anticipated volumes due to the decline of the tech industry or financial scandals, such as WorldCom's fraud, that weakened investors' confidence in the industry. These factors seem to have been a bigger part of the problem than some CLECs business plans being interrupted by losing an arbitrage scheme.

III. Core Does Not – and Cannot – Meet the Statutory Criteria Set Forth in 47 U.S.C. § 160(a)

Despite the Petition's inaccurate ramblings about the consequences of the *ISP Remand Order*, it provides very little to support the elements of forbearance required by 47 U.S.C. § 160(a). In order for the Commission to forbear from applying a regulation, the Commission must first determine that three criteria are met. Absent this finding the Commission cannot grant forbearance relief. Core's Petition, without doubt, does not meet any one of these criteria.

As discussed above, Core's labored endeavor at creating discrimination where none exists and painting the telecommunications sector slump as being caused by the *ISP Remand Order* were desperate attempts to find support where none exists for meeting the criteria of 47 U.S.C. § 160. When applied to the criteria, however, it becomes evident that even if these

²² Core offers nothing to support what amount, if any, investment it, or other similar CLECs, would have made. Indeed, given that Core admits that the *ISP Remand Order* significantly altered its business plan, it is assumed that the arbitrage scheme was its major source of income. Serving only ISP customers, however, would require very little investment, certainly nothing on the scale that would have caused the telecommunications industry slump as Core suggests.

allegations were true, which they are not, they do not in any way sustain a determination by the Commission that forbearance is appropriate.

A. The Petition Does Not Support the Criterion Set Forth in § 160(a)(1)

The first criterion requires the Commission to determine

that enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;²³

Core does little to confront this criterion other than its *ipse dixit* that the rule is not necessary to prevent anticompetitive harm. It then points to the alleged discrimination that Core claims is occurring against CLECs by the *ISP Remand Order* being in place. Core seems to forget the Commission's findings from the *Order*, namely that ILECs were being used by CLECs as a means of offering below cost service to the CLECs' ISP customers. In fact, in the *ISP Remand Order* the Commission noted on many occasions that the regulatory arbitrage practiced by CLECs with ISP-bound traffic "undermines the operation of competitive markets."²⁴ If the arbitrage scheme had been allowed to continue, not only would rates paid by ILECs to CLECs for ISP-bound traffic have been unfair and unreasonable, discrimination would exist between different services. As the Commission found, "under the current carrier-to-carrier recovery mechanism, it is conceivable that a carrier could serve an ISP free of charge and recover all of its costs from originating carriers. This result distorts competition by subsidizing one type of service at the expense of others." The unjust and unreasonable rates that would flow from ILECs

²³ 47 U.S.C. § 160(a)(1).

²⁴ *ISP Remand Order*, 16 FCC Rcd at 9183, ¶ 71.

to CLECs for ISP-bound traffic and the discrimination that would occur between services fully demonstrate that this criterion cannot be met.

B. The Petition Does Not Support the Criterion Set Forth in § 160(a)(2)

Core equally fails to provide any evidence – because it cannot – that would allow the Commission to determine that the second criterion is met. This criterion requires the Commission to determine that the rules of the *ISP Remand Order* are not necessary for the protection of consumers. Ignoring the reality of the market and the Commission's findings in the *ISP Remand Order*, Core again simply points to its allegations of discrimination and the telecommunications slump to suggest that consumers would be better off if CLECs could continue the regulatory arbitrage with ISP-bound traffic. This is completely contrary to reasoned thought and the Commission's own findings.

The consequence of the arbitrage scheme conducted by CLECs was the distortion of competitive markets. End-users were not receiving accurate price signals because the carriers and not end users were not bearing the cost for intercarrier rates. This created the incentive for CLECs to seek out ISP customers with high volumes of incoming traffic. The CLECs would offer these customers below cost service because of the reciprocal compensation subsidy that the CLEC received from other carriers. Thus, the ISP customers were not receiving accurate price signals. Moreover, ILECs typically charge their end-users averaged rates for dial-up access to an ISP, which is a local or toll-free call and therefore included in the end-users' monthly rates. Accordingly, these end-users were not paying rates that fully reflected the costs of intercarrier rates for delivering calls to the CLECs' ISP customers. The results were evident – inefficient

market segmentation by CLECs and uneconomic ISP rates – which are clearly contrary to consumer protection.

Left unchecked, these distortions would have a devastating effect on the telecommunications industry. For example, the record is uncontested that in 2000 the largest ILECs were terminating 18 times more traffic than they originated and in some cases were receiving 40 times more traffic from CLECs. Of this traffic, 90 percent was ISP-bound. This resulted in these ILECs having annual billings of a staggering two billion dollars in reciprocal compensation.²⁵ Because, as the Commission points out, the CLECs are incented not to be efficient entrants in the market, but instead to live off of the arbitrage, the market distortions will continue absent the findings of the *ISP Remand Order*. Consumers will not be protected by the distorted markets reciprocal compensation for ISP-bound traffic creates. Therefore, the Commission cannot find that the second criterion has been met.

**C. The Petition Does Not Support the Criterion Set Forth in
§ 160(a)(3)**

Just as with its failure to prove that the regulations established in the *ISP Remand Order* are not necessary for the protection of consumers, Core fails to prove that forbearance of such regulations is consistent with the public interest. As discussed above, reciprocal compensation for ISP-bound traffic prior to the *ISP Remand Order* served to distort and

²⁵ Core's grandstanding offer of asking ILECs to file signed affidavits supporting a breakdown of intercarrier compensation by traffic type is a sophomoric ploy to try to divert attention from a factually and procedurally deficient Petition. Core makes this dare even though it has not offered one sound piece of evidence, much less signed affidavits, to back up its claims. Nonetheless, the only relevant issue related to reciprocal compensation would be how much greater the imbalance between CLECs and ILECs of ISP-bound traffic billing would be had the *ISP Remand Order* not been implemented. One can be assured that it would be far greater than the two billion dollars of annual billings as of 2000.

“undermine the operation of competitive markets.”²⁶ Such results are not consistent with the public interest.

IV. Conclusion

Core’s petition is little more than recycling arguments previously considered and rejected by the Commission and the Courts. As shown above, Core has not even made a prima facie showing that it has satisfied the statutory criteria for forbearance. In these circumstances, the Commission must deny the Petition.

Respectfully submitted,

BELLSOUTH CORPORATION

By: /s/ Stephen L. Earnest
Richard M. Sbaratta
Stephen L. Earnest

Its Attorneys

BellSouth Corporation
Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375
(404) 335-0711

Dated: August 29, 2003

²⁶ See *ISP Remand Order*, 16 FCC Rcd at 9155, ¶ 5 (“under the current carrier-to-carrier recovery mechanism, it is conceivable that a carrier could serve an ISP free of charge and recover all of its costs from originating carriers. This result distorts competition by subsidizing one type of service at the expense of others.”); see also, *id.* at 9183, ¶ 71 (“we believe that the application of a [calling party’s-network pays] regime, such as reciprocal compensation, to ISP-bound traffic undermines the operation of competitive markets.”).

CERTIFICATE OF SERVICE

I do hereby certify that I have this 29th day of August 2003 served the parties of record to this action with a copy of the foregoing **OPPOSITION TO CORE'S PETITION FOR FORBEARANCE** by electronic mail and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed as follows:

*Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Room TW-A325
Washington, DC 20554

*Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554

Christopher Van de Verg
General Counsel
Core Communications, Inc.
209 West Street, Suite 302
Annapolis, MD 21401

Michael B. Hazzard
Brett Heather Freedson
Kelley Drye & Wrren LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, DC 20036

/s/ Lynn Barclay
Lynn Barclay

VIA (*) ELECTRONIC MAIL